90-870

No. _____

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IN THE

Supreme Court of the United States

October Term, 1990

SOCIETY NATIONAL BANK and JOEL A. PANDON,
Petitioners,

vs.

ROBERT WARREN and CAROLE Z. WARREN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, under §502(a)(3) of the Employee Retirement Income Security Act, a plan participant who has received all vested benefits to which he is entitled can recover monetary damages, as opposed to equitable relief, from a fiduciary to an employee benefit plan as "other appropriate equitable relief?"

(2) Whether, under the Employee Retirement Income Security Act, a participant in an employee benefit plan who has received all vested benefits due under the plan can recover from a fiduciary extra-contractual compensatory damages (damages beyond the amount of benefits due under the plan) for delays in the distribution of those vested benefits?

PARTIES TO THE PROCEEDING

SOCIETY NATIONAL BANK*

JOEL A. PANDON

ROBERT WARREN

CAROLE Z. WARREN

---

* Society National Bank is a wholly-owned subsidiary of Society Corporation. Crisler Capital Company is a non-wholly owned subsidiary of Society National Bank.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Society National Bank and Joel A. Pandon, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 22, 1990.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 905 F.2d 975 (6th Cir. 1990), and appears in the Appendix at A1 to A26. The order of the United States District Court for the Northern District of Ohio granting Petitioners' motion to dismiss is unreported and appears in the Appendix at A27 to A41.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 22, 1990. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals on September 4, 1990. Appendix at A42. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1990).

STATUTES AND REGULATIONS INVOLVED

This case involves §502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1132 (1990). This provision is reproduced in the Appendix ("App.") at A45 to A51.

STATEMENT OF THE CASE

Respondent Robert Warren ("Warren"), a physician, was employed by Westgate Medical Anesthesia Group, Inc. ("Westgate") and participated in Westgate's Pension Plan and Trust and Westgate's Profit Sharing Plan and Trust (the "Retirement Plans"). Petitioner Society National Bank ("Society") was the Trustee of the Retirement Plans. Petitioner Joel A. Pandon, a Society trust officer, was one of the persons at Society responsible for the administration of the Retirement Plans.

Warren and his wife, Respondent Carole Z. Warren (collectively, "Respondents"), alleged that at the time of his retirement, Warren decided to have his interests in the Retirement Plans transferred into a self-directed individual retirement account ("IRA") with Prescott, Ball & Turben, Inc. ("PBT"). Warren's interests totalled Five Hundred Fifty-Six Thousand Two Hundred Forty-Two Dollars and Thirty-Four Cents ($556,242.34). Respondents alleged that Society was directed to transfer all of Warren's assets in the Retirement Plans to PBT, but notably did not allege that the assets were to be transferred into an IRA.

On December 5 and December 11, 1984, Society transferred more than two-thirds of Warren's assets to PBT. Warren's remaining assets in the Retirement Plans were transferred to PBT on January 9, 1985 and May 23, 1985. Respondents alleged that, under the Internal Revenue Code, the transfer of Warren's assets from the Retirement Plans to an IRA would have been a nontaxable rollover if the transfer had occurred within a single calendar year. Because Society transferred a portion of Warren's assets to PBT in 1985, Respondents alleged that they were required to pay taxes on the portion of assets transferred in 1985. Respondents also alleged that the assets transferred in 1985 could not be

retained in the IRA and that future income earned on these assets would lose the benefit of "the compounding effect of tax deferment."[1]

Despite receiving all plan benefits to which he was entitled, which consisted of the total value of his interests in the Retirement Plans, and without complying with the claims review process under the Retirement Plans, Warren filed suit against Petitioners on December 29, 1987, in the United States District Court for the Northern District of Ohio. Respondents' Amended Complaint purported to assert a claim under §502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), and alleged the existence of federal jurisdiction under ERISA §502(e)(1), 29 U.S.C. §1132(e)(1). Specifically, Respondents alleged that by failing to transfer all of Warren's assets in the Retirement Plans to PBT in the calendar year 1984, Petitioners failed to discharge their fiduciary duties as required by §404 of ERISA, 29 U.S.C. §1104. Significantly, Respondents did not allege that Society withheld or failed to disburse any assets or benefits due and owing to Warren under the Retirement Plans. In other words, Respondents did not claim contractual damages for loss of plan benefits or assets in this action; nor could they, since they acknowledged that all of Warren's assets were transferred to PBT.

As "other appropriate equitable relief" under §502(a)(3), Respondents alleged that the delay in transferring the assets caused Respondents to pay additional federal income tax and interest for 1985 totalling Seventy-Four Thousand Four Hundred

[1] Petitioners dispute Respondents' contention that the transfer of the assets in two different calendar years resulted in a taxable event to Respondents and in the loss of any income tax deferral status. Instead, Respondents, based upon faulty tax advice from third parties and contrary to the urgings of Petitioners, mistakenly withdrew the assets transferred in 1985 from the IRA and elected to declare these assets as taxable income in that year, thereby foregoing any deferral of taxes on those assets. Thus, Respondents voluntarily paid taxes on these monies.

Seventy-Six Dollars ($74,476.00) and additional state income tax and interest in the amount of Twelve Thousand Seven Hundred Twenty-Nine Dollars ($12,729.00). Respondents further alleged that their lost opportunity for future tax deferred treatment of the assets transferred to PBT in 1985 would cause an ultimate economic loss to them in the amount of Three Hundred Seventy-Five Thousand Four Hundred Thirty Dollars ($375,430.00).

In response to Respondents' Amended Complaint, Petitioners filed a motion to dismiss for failure to state a claim under ERISA on the grounds that Respondents had not alleged contractual damages for loss of benefits or failure to pay benefits under the Retirement Plans. Rather, Respondents' alleged damages are strictly extra-contractual in the form of income tax paid and alleged loss of tax-deferred treatment on certain assets after they had been transferred out of the Retirement Plans and after Respondents had voluntarily and mistakenly withdrawn certain assets from the IRA. Petitioners argued that ERISA does not permit a participant or beneficiary of an employee benefit plan to personally recover extra-contractual damages, *i.e.*, damages that are separate and distinct from the benefits or assets due and owing under a plan.

The district court granted Petitioners' motion to dismiss, holding that extra-contractual damages are not recoverable under §502(a)(3) of ERISA.[2] It then found that the damages sought by Respondents, tax and tax interest liability and alleged loss of future tax-deferred investment status resulting from a delay in transferring assets out of the Retirement Plans, are extra-contractual damages. In particular, the district

[2] The district court further held that the Amended Complaint should be dismissed on the alternative ground that Respondents failed to allege facts sufficient to form an inference that Petitioners owed a fiduciary duty to transfer Warren's assets in a single calendar year. This alternative ruling, which was reversed by the Sixth Circuit, is not before this Court.

court held that damages that are not within the terms of an ERISA-governed benefit plan are extra-contractual and not recoverable under §502(a)(3) of ERISA. App. at A39. The district court also adopted the position that the "other appropriate equitable relief" provided for in ERISA §502(a)(3)(B) means declaratory or injunctive relief, not compensatory or punitive damages. *Id.* The district court further held that its conclusions were supported by the common law of trusts, which are, in part, incorporated into and applicable to ERISA. App. at A39-A41.

In dismissing Respondents' Amended Complaint, the district court rejected Respondents' argument that their compensatory damage claims were for contractual damages. The district court thus accepted, *sub silentio*, Petitioners' contention that the only "benefits" to which Respondents were entitled consisted solely of the assets held in the Retirement Plans, all of which had been transferred pursuant to Warren's direction, and that the "benefits" due to Respondents did not include tax-exempt status or future income tax deferral with respect to assets already transferred out of the Retirement Plans. Consequently, the district court concluded that Respondents' alleged damages were not within the terms of the Retirement Plans.

Respondents appealed, arguing that the damages they sought were not extra-contractual. The Sixth Circuit, in a 2-1 decision (Circuit Judge Wellford dissenting), reversed the district court's decision and remanded the case for further proceedings. App. at A19. In so doing, the Sixth Circuit failed to directly address the critical issue of whether Respondents' alleged damages are extra-contractual. Instead, the Court created a broad new rule of law that provides that a participant or beneficiary is entitled to a remedy that puts them in the position they would have been in if the fiduciary had not committed an alleged breach of trust, which remedy includes monetary damages. App. at A16.

The Court of Appeals primarily relied upon Justice Brennan's interpretation of §502(a)(3) of ERISA set forth in his concurrence in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148-158 (1985) (Brennan, J., concurring). App. at A10 & A15-A16.

The Court of Appeals treated Respondents' Amended Complaint as alleging the breach of a contractual duty to distribute all assets in a lump sum and concluded that the "other appropriate equitable relief" clause of §502(a)(3) allows a claim for compensatory damages to redress a direct injury caused by a fiduciary's alleged violation of a contractual duty. In so holding, the Court of Appeals rejected Petitioners' argument that a participant's claim for damages under ERISA is limited to the assets due and owing under a plan. Moreover, the Sixth Circuit reasoned that the right to recover plan assets and typical "equitable relief" would have provided no redress to Respondents.

Thus, the Sixth Circuit concluded that an award of damages beyond the assets distributed from the Retirement Plans was the only means to redress Society's alleged breaches of duty and that the damages sought by Respondents were recoverable as "other appropriate equitable relief" under §502(a)(3)(B)(i) of ERISA. App. at A18. In the Sixth Circuit's view, the " 'carefully integrated civil enforcement provisions' of section 502(a)(3) should be held to provide an avenue of redress" to Respondents (*id.* at A19) notwithstanding that: (1) ERISA and its legislative history demonstrate that Congress did not intend to authorize the recovery of extra-contractual damages as "other appropriate equitable relief" under §502(a)(3) of ERISA; (2) Congress expressly provided a cause of action to plan participants and beneficiaries in the benefit claims context limited to the recovery of plan benefits and the enforcement and clarification of their rights under a plan, §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B); (3) Respondents'

alleged damages traditionally have not been viewed as either remedial or equitable forms of relief; and (4) affording plan participants the right to recover extra-contractual damages as "benefits" will open the door to a flood of ERISA litigation not intended by Congress.[3]

[3] Circuit Judge Wellford wrote a strong dissent highlighting that the decision misconstrued the purposes of ERISA, conflicts with *Russell*, *supra*, conflicts with prior decisions of the Sixth Circuit, conflicts with decisions of four other courts of appeals, and fails to cite a single ERISA majority decision to support its position. Circuit Judge Wellford saw "no basis for the extensive efforts of [his] brethren to create a cause of action for the Warrens on general equitable principles apart from the language of ERISA." App. at A26.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S EXTRA-CONTRACTUAL DAMAGES RULING CONFLICTS WITH DECISIONS OF THIS COURT, THE FIRST, FOURTH, NINTH AND ELEVENTH CIRCUITS, PRIOR DECISIONS OF THE SIXTH CIRCUIT AND NUMEROUS DISTRICT COURTS.

Review of the Sixth Circuit's ruling on extra-contractual damages is essential to resolve a newly-created conflict between the Sixth Circuit and this Court, the First, Fourth, Ninth and Eleventh Circuits and among the district courts. That the Sixth Circuit has now authorized an award of extra-contractual compensatory damages under §502(a)(3) of ERISA—damages outside the terms of the Retirement Plans—is manifest from the decision below. This holding squarely conflicts with the reasoning of all circuit courts of appeals that have considered the availability of extra-contractual compensatory damages under ERISA generally and the availability of damages (as opposed to equitable relief) under §502(a)(3) of ERISA. *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-825 (1st Cir. 1988), *cert. denied*, 488 U.S. 909 (1988); *Powell v. Chesapeake & Potomac Telephone Co. of Va.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Sokol v. Bernstein*, 803 F.2d 532, 534-538 (9th Cir. 1986); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306-1307 (9th Cir. 1986); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 158 (1989); *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1508-1509 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1568 (1989).[4] These courts of appeals

[4] The decision below is also contrary to prior Sixth Circuit precedent. *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1924 (1990); *International Union*

(Footnote continued on following page.)

have applied this Court's majority opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) ("*Russell*"), to prohibit the recovery of extra-contractual compensatory damages under §502(a)(3) of ERISA specifically and under ERISA generally. In contrast, the Sixth Circuit rejected the majority opinion in *Russell* and, instead, relied on Justice Brennan's concurrence. Thus, the Sixth Circuit's decision likewise conflicts with this Court's reasoning, analysis and interpretation of ERISA in *Russell*.

In addition, the Sixth Circuit's holding conflicts with numerous district court decisions holding that extra-contractual compensatory damages are not recoverable under any provision of ERISA. *See, e.g., Brentwood Nursing & Rehabilitation Center, Inc. v. Janes*, Nos. 88 C9649 & 9659 (N.D. Ill. February 1, 1990); *Scott v. Central States, Southeast and Southwest Areas Pension Plan*, 727 F. Supp. 1095, 1098 (E.D. Mich. 1989); *Williams v. Caterpillar, Inc.*, 720 F. Supp. 148, 150-151 (N.D. Cal. 1989); *Morford v. Reserve Life Ins. Co.*, 702 F. Supp. 603, 604 (S.D. W. Va. 1989); *Haberern v. Kaupp Vascular Surgeons, Ltd.*, No. 88-1853 (E.D. Pa. June 26, 1989); *Rollo v. Maxicare of Louisiana*, 698 F. Supp. 111, 115 (E.D. La. 1988); *Eaton v. Blue Cross and Blue Shield of Alabama*, 681 F. Supp. 759, 762 (S.D. Ala. 1988); *Benvenuto v. Connecticut General Life Ins. Co.*, 678 F. Supp. 469, 472-474 (D. N.J. 1988); *Bova v. American Cyanamid Co.*, 662 F. Supp. 483, 489 (S.D. Ohio 1987) ("A plan participant or beneficiary who brings suit under [§502] to redress a denial of benefits may recover for benefits owed, but cannot recover extra-contractual compensatory and punitive damages.").

(Footnote continued from preceding page.)

UAW Local 91 v. Park-Ohio Industries, Inc., 876 F.2d 894 (6th Cir. 1989) (unpublished opinion) (extra-contractual compensatory damages are not available in actions under either §502(a)(1)(B) or §502(a)(3) of ERISA); *see also Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages are not recoverable under §502(a)(3) of ERISA, relying on *Russell*).

Prior to the decision by the Sixth Circuit, there was some division among the district courts across the country on the availability of extra-contractual compensatory damages under ERISA. *See Maryonovich v. Market Data Retrieval, Inc.*, 716 F. Supp. 343, 351 (N.D. Ill. 1989) (extra-contractual damages may be available under §502 of ERISA); *McRae v. Seafarers' Welfare Plan*, 726 F. Supp. 817, 821 (S.D. Ala. 1989) (permitting award of extra-contractual damages as "other appropriate equitable relief" under §502(a)(3)(B) of ERISA); *Jordan v. Connecticut General Life Ins. Co.*, Civ. No. 89-2027-0 (D. Kan. April 17, 1990) (extra-contractual damages are recoverable under §502(a)(3) of ERISA); and *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 833 (N.D. Ala. 1988). The confusion created by these rulings has already affected employee benefit plans and their fiduciaries across the country. The Sixth Circuit has now fueled the fire of confusion, and opened the door to a flood of unnecessary litigation, by ignoring existing precedent interpreting §502 of ERISA and by creating a new cause of action in direct conflict with the prior decisions of all courts of appeals and of this Court.

A. The Decision Below is Inconsistent with the Prior Ruling of this Court in *Russell*.

In *Russell*, this Court held that §§409 and 502(a)(2)[5] of ERISA do not allow a beneficiary to recover extra-

[5] Section 502(a)(2) of ERISA provides that a "civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 . . . ." 29 U.S.C. §1132(a)(2). Section 409(a) provides in relevant part as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such *other equitable or remedial relief* as the court may deem apppropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

29 U.S.C. §1109(a) (emphasis added).

contractual damages from a fiduciary. While this Court admittedly reserved the issue of recovery of extra-contractual damages under §502(a)(3),[6] the vast majority of subsequent decisions have relied on *Russell* in holding that such damages are not recoverable under any provision of ERISA. *See, e.g., Amos v. Blue Cross-Blue Shield*, 868 F.2d at 431; *United Steelworkers of America v. Connors Steel*, 855 F.2d at 1508-1509; *Drinkwater*, 846 F.2d at 824-825; *Sokol*, 803 F.2d at 534-538; *Hancock*, 787 F.2d at 1306-1307.

In *Russell*, the beneficiary sought extra-contractual and punitive damages for delays in providing disability benefits. 473 U.S. at 136-137. The beneficiary alleged that, as a result of an interruption and delay in paying benefits, her disabled husband was required to cash out his retirement savings (resulting in economic damages) which, in turn, aggravated her own psychological condition. *Id.* at 137. Specifically, the beneficiary alleged that because of the delay and interruption of payment of benefits, she and her husband were forced to cash out his retirement savings plan and suffered "[t]he economic loss of lifetime benefits from the retirement plan" as a result of the alleged breach of fiduciary duty. *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482, 486-487 (9th Cir. 1983), *rev'd.*, 473 U.S. 134 (1985). In *Russell*, the beneficiary had received all benefits, but sought to recover additional economic losses allegedly resulting from the delay in processing the claim. Petitioner Warren asserts an identical claim herein—damages allegedly resulting from a delay in transferring benefits due.

The Ninth Circuit in *Russell* had held that "the award of compensatory damages shall 'remedy the wrong and make the aggrieved individual whole' . . . ." *Russell*, 473 U.S. at 138. The Ninth Circuit had also held that an award of compensatory damages would include "not merely contractual damages for loss of plan benefits, but

[6] 473 U.S. at 139 n.5.

relief 'that will compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of fiduciary duty' . . . ." *Id.* This Court rejected this approach, thereby indicating that contractual damages are limited to the "loss of plan benefits" as defined under ERISA:

> In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extra-contractual damages.

473 U.S. at 148. Thus, anything beyond defined benefits due under a plan is extra-contractual and not recoverable under ERISA. The Sixth Circuit, however, has expanded the scope of damages recoverable under ERISA far beyond "plan benefits" to include any damages that will make a plaintiff whole. App. at A16.

In addition to rejecting the measure of damages announced in *Russell*, the Sixth Circuit's decision failed to adopt *Russell's* analysis of ERISA and, instead, relied upon Justice Brennan's concurrence as the foundation for its decision. App. at A10 & A15-A16. This conflict between the decision below and this Court's decision in *Russell* is highlighted by Circuit Judge Wellford's stinging dissent in which he suggests that this Court's majority opinion in *Russell* is the "proper guide to follow, rather than Justice Brennan's separate opinion which speaks for a minority of the Court." App. at A23.

The conflict between the decision below and the *Russell* decision is further highlighted by the Sixth Circuit's repeated and unsuccessful attempts to distinguish *Russell*. For example, the court below claimed that *Russell* is distinguishable because the beneficiary therein had received all benefits to which she was contractually entitled, apparently suggesting that Respondent Warren had not received all the benefits to

which he was contractually entitled.[7] In fact, the beneficiary's claims in *Russell* and Respondents' claims herein are virtually identical. In *Russell*, the beneficiary claimed that she had not received her benefits on a timely basis and was thereby damaged. Similarly, Respondent Warren received all vested benefits to which he was entitled, but alleged that he did not receive them in a timely fashion and suffered resulting damages. Thus, the decision below conflicts with this Court's decision in *Russell* and represents a dramatic shift in the law which requires the review of this Court.

B. The Decision Below is in Direct Conflict with the Decisions of all Other Circuit Courts of Appeals that have Considered the Availability of Extra-Contractual Damages Under §502(a)(3) of ERISA, as well as Numerous District Courts.

Petitioners below relied upon numerous decisions in other courts of appeals, as well as other district courts, which have held that extra-contractual damages are not recoverable under ERISA, including prior decisions of the Sixth Circuit itself. *See, e.g., Davis v. Kentucky Finance,* 887 F.2d at 696; *UAW Local 91 v. Park-Ohio, supra; Amos v. Blue Cross-Blue Shield,* 868 F.2d at 431; *United Steelworkers of America v. Connors Steel,* 855 F.2d at 1509; *Drinkwater,* 846 F.2d at 824-825; *Sokol,* 803 F.2d at 537-538; *Hancock,* 787 F.2d at 1306-1307; *Scott v. Central States,* 727 F. Supp. at 1098; *Williams v. Caterpillar,* 720 F. Supp. at 150-151; *Morford v. Reserve Life,* 702 F. Supp. at 604; *Haberern v. Kaupp, supra; Rollo v. Maxicare,* 698 F. Supp. at 115; *Eaton v. Blue Cross and Blue Shield,* 681 F. Supp. at 762; *Benvenuto v. Connecticut General,* 678 F. Supp. at 472-474; *Bova v. American Cyanamid,* 662 F. Supp. at 489.

[7] If, however, Respondent Warren had not received benefits to which he was contractually entitled, then he would have a claim to recover "benefits" under ERISA §502(a)(1)(B). Neither Respondent Warren nor the Court of Appeals took such a position, obviously recognizing that such a position would be blatantly inconsistent with the express language of ERISA.

The Ninth Circuit's decision in *Sokol* was one of the first decisions to apply *Russell's* analysis to a claim for extra-contractual damages under ERISA §502(a)(3). 803 F.2d at 534. In *Sokol*, the court held that "a textual exegesis of the *Russell* opinion, combined with careful examination of the statute's structure and legislative history, compels the conclusion that [extra-contractual damages] are unavailable under §502(a)(3)" and there is "considerable support in *Russell* for the proposition that no provision in ERISA authorizes the award of extra-contractual damages." *Id.* at 534-535. The Ninth Circuit also noted that §502(a)(3) " 'says nothing about the recovery of extra-contractual damages' ... and emphasizes protection of the *plan*, not the direct protection of beneficiaries." *Id.* at 536 (citation omitted) (emphasis in original).

Thus, the Ninth Circuit found that "the catch-all phrase of 'other appropriate equitable relief' in §502(a)(3) provides no more foundation for an award of [extra-contractual damages] than does the same catchall phrase in §409(a)." *Id.* The Ninth Circuit concluded that to allow a beneficiary to assert a claim for damages other than benefits is contrary to the express provisions of ERISA, as well as Congress' clear intent in drafting those provisions. In holding that Respondents may recover damages other than benefits due under the Retirement Plans, the decision below directly conflicts with the Ninth Circuit's holding that extra-contractual damages are not recoverable under §502(a)(3).

In *Drinkwater*, the First Circuit held that compensatory and punitive damages are extra-contractual if the relief sought "is not within the terms of [the employer's] ERISA-governed benefit plan." 846 F.2d at 824. The plaintiffs in *Drinkwater* conceded that the extra-contractual damages they sought were not expressly authorized by ERISA, but contended that these damages came within the statutory grant of "other

appropriate equitable relief" under ERISA §502(a)(3)(B). *Id.* Concluding that it was "clear that the comprehensive provisions of ERISA were intended by Congress to be the exclusive remedy for beneficiaries under ERISA-authorized plans," the First Circuit concluded that " '[o]ther appropriate equitable relief' should be interpreted to mean what it says—declaratory or injunctive relief, not compensatory and punitive damages." *Id.* Citing to *Sokol*, the First Circuit held that " 'it appears that Congress used the word 'equitable' [in §1132(a)(3)] to mean what it usually means—injunctive or declaratory relief.' " 846 F.2d at 825 (quoting *Sokol*, 803 F.2d at 538). The decision below directly conflicts with this holding in that the court below held that "other appropriate equitable relief" includes monetary damages. App. at A16 & A18.

In *Amos v. Blue Cross-Blue Shield*, an Eleventh Circuit decision, the plaintiffs' claims arose out of the alleged wrongful denial of claims for benefits under an employee benefit plan and plaintiffs therein sought contract benefits plus extra-contractual compensatory and punitive damages. The defendant moved to strike "claims for damages other than the contractual benefits sought . . . alleging that, under ERISA, extra-contractual and punitive damages are not recoverable as a matter of law." 868 F.2d at 431. The Eleventh Circuit held that "the various types of relief available to plaintiffs in civil actions brought pursuant to ERISA's civil enforcement scheme do not include extra-contractual or punitive damages." *Id.* The decision below conflicts with the Eleventh Circuit's holding that damages other than contractual "benefits" are extra-contractual.[8]

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[8] In *Powell v. Chesapeake & Potomac Telephone Co. of Va.*, *supra*, the Fourth Circuit denied recovery of extra-contractual damages under §502(a) of ERISA, holding that such damages are generally not available in an action by a beneficiary against a trustee for breach of trust. 780 F.2d at 424.

The decision below also conflicts with the decisions of various district courts, which have held that §502(a) does not authorize the recovery of compensatory damages not due under the terms of a plan. *See, e.g., Williams v. Caterpillar,* 720 F. Supp. at 151 ("Plaintiffs are clearly claiming for relief which they are not due under the contractual terms of their plan, relief which ERISA will therefore not supply."); *Haberern v. Kaupp, supra* (compensatory damages, including lost profits that would have been earned on the investment of plaintiff's benefits that were transferred to a money market account, rather than being distributed, were extra-contractual and not recoverable under ERISA); *Morford v. Reserve Life,* 702 F. Supp. at 604 ("[B]ecause ERISA comprehensively provides civil remedies for claims relating to an employee benefit plan and does not expressly provide for the recovery of damages flowing from a failure to pay benefits, . . . Plaintiff's recovery . . . must be limited to those benefits, if any, to which she was entitled."); *Eaton v. Blue Cross-Blue Shield,* 681 F. Supp. at 762 ("The imposition of damages beyond the benefits due under an ERISA plan thus goes against the express language of the Act .... [A] participant's or beneficiary's recovery is limited to benefits due him under the terms of the plan ...."); *Scott v. Central States,* 727 F. Supp. at 1098 (Extra-contractual damages in the form of interest which had accrued during the 12 years between the time plaintiff applied for benefits and the time he received a lump sum payment of those benefits are not recoverable under §502(a)(3).)

In light of the foregoing, it is evident that the Sixth Circuit's decision creates a dangerous conflict by holding that Respondents can recover money damages under ERISA §502(a)(3), while other courts have limited claimants to purely equitable relief, and by holding that damages other than contractually defined benefits can be recovered under ERISA generally. This conflict with

other Circuits and district court decisions will necessarily generate confusion for the courts in ERISA litigation matters, as well as for participants, beneficiaries and fiduciaries. Review by this Court is necessary to reconcile the conflict presented by the decision below and to provide practical guidance to lower courts faced with claims under §502(a)(3).

II. THE DECISION BELOW IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND ITS LEGISLATIVE HISTORY, AND REQUIRES REVERSAL BY THIS COURT.

The Sixth Circuit's decision not only promises to engender great confusion in the lower courts, but also rests on a fundamental misconstruction of ERISA and its purposes. Even a cursory review of ERISA §502(a) demonstrates that, by its terms, there is no provision whatsoever for a participant or beneficiary to personally recover damages of any kind other than benefits due under a plan. Section 502(a) provides the exclusive civil enforcement remedies for participants and beneficiaries under ERISA, and provides in relevant part as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) *to recover benefits due to him* under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) *to enjoin* any act or practice which violates any provision of this title or the terms of the plan, or

> (B) to obtain other appropriate *equitable relief*
>
> (i) to redress such violations or
>
> (ii) to enforce any provisions of this title or the terms of the plan . . . .

29 U.S.C. §1132(a) (emphasis added).

Section 502(a)(1)(B) does not authorize a claim for extra-contractual damages. Rather, it limits a participant's or beneficiary's claim for damages to benefits due under the terms of a plan.[9] Similarly, this Court has put to rest the question of whether a plan participant or beneficiary can personally recover damages from a plan fiduciary under ERISA §502(a)(2), holding that no such damages are available to an individual participant or beneficiary. *Russell*, 473 U.S. at 148.

Faced with the inability of a participant to personally recover anything beyond benefits due under ERISA §§502(a)(1) and 502(a)(2), the Sixth Circuit incorrectly interpreted the "other appropriate equitable relief" clause of §502(a)(3) to permit an award of monetary damages to redress an alleged violation of ERISA. Section 502(a)(3), however, contains no provision whatsoever for the recovery of monetary damages of any kind. It is, by its own terms, limited to equitable relief, either in the form of an injunction, §502(a)(3)(A), or "other appropriate equitable relief," §502(a)(3)(B)(i). Nevertheless, the Sixth Circuit has engaged in a result-oriented interpretation of the "other appropriate equitable relief" language in §502(a)(3) to create a damage remedy that does not exist under ERISA. As a

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[9] The term "benefits" is a term of art under ERISA used to refer to payments due to a participant or beneficiary, whether they be disability payments, health or medical payments or pension or profit sharing payments. *See, e.g.*, §§3(2)(A)(ii), (22)-(23), (25), (28)-(31) & (34), 29 U.S.C. §§1002(2)(A)(ii), (22)-(23), (25), (28)-(31) & (34); §103(b)(2), 29 U.S.C. §1023(b)(2); §105(a), 29 U.S.C. §1025(a); §§204(b)(1)(A)-(B), 29 U.S.C. §§1054(b)(1)(A)-(B); §205(c)(4), 29 U.S.C. §1055(c)(4); §209(a)(1), 29 U.S.C. §1059(a)(1).

consequence, the Sixth Circuit's decision sharply conflicts with this Court's strict interpretation of §502(a) in *Russell*:

> The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

473 U.S. at 146.

In addition to negating the plain language of ERISA's carefully crafted enforcement scheme, the Sixth Circuit's ruling that §502(a)(3) allows a participant to personally recover damages beyond benefits due to him runs afoul of ERISA's legislative history. As this Court held in *Russell*, the focus of ERISA is the protection of plan assets and the plan itself. *Russell*, 473 U.S. at 140-143. Likewise, in *Sokol*, the Ninth Circuit highlighted that the "entire statute was aimed at the protection of the integrity of pension plans rather than a direct protection of beneficiaries." 803 F.2d at 537. This Court has explicitly held that "ERISA was enacted . . . to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). ERISA was not designed to protect the individual interests of particular participants and beneficiaries. Rather, participants and beneficiaries are indirectly protected by the direct protection ERISA provides to plans and plan assets. The decision below, however, misconstrued ERISA, particularly §502(a)(3), as having been intended primarily to protect individual participants and beneficiaries from any and all damage which might flow from an alleged breach of fiduciary duty.

As highlighted by the Ninth Circuit in *Sokol*, the Senate Finance Committee described the remedies against a breaching fiduciary as follows:

> The bill specifically makes a fiduciary who breaches any of the specified duties personally liable; the fiduciary must make good any losses *which the plan*

> *sustained* from the breach and must restore *to the plan* any profits which he made using plan assets.

Sokol, 803 F.2d at 537 (quoting S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4988) (emphasis added). Thus, the legislative focus was on the direct protection of plans, which would, in turn, protect beneficiaries and participants. While the committee report also stated that the Secretary of Labor, participants and beneficiaries of a plan may "bring civil actions for any appropriate *legal* or equitable relief to redress or restrain a violation of fiduciary duties" (*Id.* (emphasis added)), the reference to "legal" relief was deleted and not included in the statute. *Sokol*, 803 F.2d at 537 n.5. The fact that Congress considered and rejected a provision for legal relief in ERISA argues against any suggestion that ERISA, particularly §502(a)(3), was intended to provide for extra-contractual damages and other legal remedies.

In concluding that "Congress used the word 'equitable' to mean what it usually means—injunctive or declaratory relief," the Ninth Circuit in *Sokol* referred to the Senate Finance Committee Report on ERISA which defined "appropriate equitable relief" as follows:

> Appropriate equitable relief may be granted in a civil action. For example, *injunctions may be granted* to prevent a violation of fiduciary duty, and *a constructive trust may be imposed* on the plan assets, if needed to protect participants and beneficiaries. Also, the bill specifically provides that a fiduciary may be *removed* through civil action brought by the Secretary or participants or beneficiaries if he has violated any of the specified fiduciary obligations .... It is expected that a fiduciary ... may be removed for repeated or substantial violations of his responsibilities, and that upon removal the court may, in its discretion, *appoint someone* to serve until a fiduciary is properly chosen in accordance with the plan.

803 F.2d at 537-538 (quoting S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989) (emphasis added). Thus, there is nothing whatsoever in the legislative history of ERISA to suggest that "other appropriate equitable relief" meant anything other than what is typically considered equitable relief—injunctions, declaratory judgments, creation of constructive trusts and removal and appointment of fiduciaries. Thus, various courts have interpreted the "other appropriate equitable relief" language in ERISA §502(a)(3) to be limited to typical equitable remedies. *See, e.g., Sokol,* 803 F.2d at 537; *Drinkwater,* 846 F.2d at 824-825; *Williams v. Caterpillar,* 720 F. Supp. at 151.

In concluding that extra-contractual damages are recoverable under ERISA §502(a)(3), the Sixth Circuit ignored the express language of that section and misconstrued the purposes of ERISA's civil enforcement provisions. A dispositive decision by this Court is necessary to restore Congress' purpose to protect plan assets and contractually defined benefits.

III. THE SIXTH CIRCUIT'S CONCLUSION THAT ERISA "BENEFITS" INCLUDE DAMAGES ARISING AFTER ALL PLAN BENEFITS ARE DISTRIBUTED TO A PARTICIPANT CONTRAVENES THE TEACHINGS OF THIS COURT AND OTHER CIRCUIT COURT DECISIONS.

Without citing a single ERISA case to support its interpretation, the Sixth Circuit expansively interpreted the term "benefits" under ERISA to include damages arising after all plan benefits are distributed to a participant. Relying on Warren's allegation that Society's failure to distribute his plan assets in a lump sum made a portion of the assets subject to income taxes upon distribution, the Sixth Circuit held that Warren had lost "one of the most significant benefits available under ERISA." App. at A18. Because

Warren was allegedly unable to accomplish a rollover of his plan assets into an individual retirement account, the Sixth Circuit interpreted Warren's claim as a charge that Society deprived him of "a benefit to which he was entitled under the plans ...." *Id.* The practical result of the Sixth Circuit's reasoning is that a claim for "benefits" under ERISA includes damages for income taxes paid on plan assets after they are distributed to a participant, as well as the loss of the opportunity to invest plan assets in an individual retirement account after they are distributed out of the plan. This conclusion is contrary to fundamental interpretations of ERISA.

In sharp contrast to the Sixth Circuit's interpretation of the term "benefits," the district court below observed that " 'benefits' in the ERISA context is a term generally understood to mean those monies paid pursuant to the plans in question." App. at A35.[10] Similarly, in *Russell*, this Court *rejected* the Ninth Circuit's position that a beneficiary is entitled to recover damages under ERISA in addition to "contractual damages for loss of plan benefits," thereby indicating that contractual damages are limited to "plan benefits," *See* 473 U.S. at 138. Moreover, cases construing "participant" for purposes of the civil enforcement provisions of ERISA have also limited the term "benefits" to vested benefits under a plan. *See, e.g., Firestone Tire & Rubber,* 489 U.S. at 117 ("ERISA was enacted ... 'to protect contractually defined benefits.' "); *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied,* 479 U.S. 916 (1986) ("Because, if successful, the plaintiffs' claim would result in a damage award, not an increase of vested benefits, they are not plan participants.").[11]

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[10] *See* footnote 9, *supra.*

[11] Since Respondents sought to recover damages under ERISA §502(a)(3) rather than §502(a)(1)(B). Respondents have acknowledged that they have received all "benefits" to which they are entitled under the Retirement Plans.

The foregoing authorities make it clear that contractual damages recoverable under the Retirement Plans are limited solely to Warren's vested benefits, all of which have been paid in full. Respondents, having received all "benefits" due under the Retirement Plans, seek to recover extra-contractual damages. Unless reversed, the Sixth Circuit's grant of a cause of action to Respondents to recover extra-contractual damages under the guise of ERISA "benefits" will undermine ERISA and the well-established rule that a participant's recoverable damages are limited to "plan benefits."

IV. THE DECISION BELOW WILL, IF FOLLOWED, ERODE EXISTING STANDING REQUIREMENTS UNDER ERISA, THEREBY OPENING THE DOOR TO A PROLIFERATION OF LITIGATION NOT ORIGINALLY CONTEMPLATED BY ERISA.

Although the Sixth Circuit failed to even consider the impact of its decision on the issue of standing, its ruling represents a major expansion of ERISA standing requirements. In the context of Respondents' Amended Complaint, it is clear that Warren must be a "participant" in order to have standing to bring a civil action under ERISA. *See* ERISA §502(a), 29 U.S.C. §1132(a). ERISA §3(7) defines a "participant" as follows:

> [A]ny employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit of any type* from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive *any such benefit.*

29 U.S.C. §1002(7) (emphasis added). This standing requirement has been the subject of extensive litigation and interpretation by various courts, including this

Court. The result has been a careful interpretation of what types of claims are sufficient to bestow "participant" status on a former employee.

In *Kuntz v. Reese, supra,* the Ninth Circuit held that the plaintiffs were not participants because "as former employees whose *vested benefits* under the plan have *already been distributed* in a lump sum, the Kuntz plaintiffs were not 'eligible to receive a benefit,' and were not likely to become eligible to receive a benefit, at the time they filed the suit." 785 F.2d at 1411 (emphasis added). The Ninth Circuit continued as follows:

> Because, if successful, the plaintiffs' claim would result in a damage award, *not in an increase of vested benefits,* they are not plan participants. The Kuntz plaintiffs do not allege that their vested benefits were improperly computed, rather they allege breach of fiduciary duty or of a duty to disclose information about benefits, *thus any recoverable damages would not be benefits from the plan.*

Id. (emphasis added). The Ninth Circuit continued by holding that:

> To be a 'participant,' a person must have either a present or a future right to benefits under the pension or retirement plan. *This excludes retirees who have accepted the payment of everything due them in a lump sum,* because these erstwhile participants *have already received the full extent of their benefits and are no longer eligible to receive future payments.* Such retirees have no present or future right to Plan funds, and the Plan no longer has any obligation to these individuals.

Id. (emphasis added) (quoting *Joseph v. New Orleans Electrical Pension & Retirement Plan,* 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied,* 474 U.S. 1006 (1985)).

This Court approved of and adopted the reasoning of *Kuntz* in *Firestone Tire & Rubber Co. v. Bruch, supra,* holding:

> In our view, the term 'participant' is naturally read to mean ... former employees ... who have 'a colorable claim' to *vested benefits.* In order to establish that he 'may become eligible for benefits,' a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.

489 U.S. at 117-118 (emphasis added) (citations omitted).

The decision below rewrites ERISA's standing requirement and is in direct conflict with this Court's decision in *Firestone Tire & Rubber Co.* Respondents herein are not seeking to recover vested benefits and have not alleged, and could not allege, that they may become eligible for vested benefits in the future. Respondents simply seek to recover damages above and beyond vested benefits that they have already received in full. Any award to Respondents would be a damage award, not an increase of vested benefits. Therefore, Respondent Warren is not a "participant" under the terms of ERISA.[12]

The Sixth Circuit's decision below will, if followed, establish a new and more liberal standing requirement under ERISA. The result will be a flood of ERISA litigation never before permitted by, or contemplated under, ERISA. While the Sixth Circuit did not expressly consider the impact of its decision on this important standing issue, the negative impact of this decision on the scope of ERISA litigation requires a dispositive decision by this Court. This critical standing issue should not be left to an inadvertent decision by the Sixth Circuit.

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[12] While Warren's wife, Carole Warren, might argue that she is a "beneficiary," "the rights of beneficiaries are derivative from the rights of participants." *Teagardener v. Republic-Franklin Incorporated Pension Plan,* 909 F.2d 947, 954 (6th Cir. 1990). Since Warren is not a "participant," his wife cannot be a "beneficiary."

V. THE QUESTIONS PRESENTED BY THIS PETITION HOLD IMPORTANT IMPLICATIONS FOR EMPLOYEE BENEFIT PLANS AND THE FEDERAL COURTS.

The Sixth Circuit's damages ruling will undoubtedly have significant and adverse implications both for the proper administration of employee benefit plans and the federal courts. Studies by the Department of Labor indicate that in the United States there are approximately 500,000 private pension plans, which alone cover over 50,000,000 individuals, as well as an estimated 1.6 million sponsors of private employee welfare benefit plans. *See* U.S. Dep't. of Labor, Labor-Management Services Admin., Pension and Welfare Benefits Programs, *Estimates of Participant and Financial Characteristics of Private Pension Plans* at 1 (1983); 4 Health and Population Study Center, Battelle Human Affairs Research Centers, *Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States, 1978-79* at 24 (1980). More recently, it has been estimated that 81% of all workers in medium and large firms were covered by at least one retirement plan in 1989. *See* U.S. Dep't. of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Firms, 1989* at 2 (1990). Also in 1989, 63% of employees in medium and large firms participated in defined benefit pension plans and 48% participated in one or more defined contribution plans. *Id.* at 80 & 107. Since millions of claims for retirement, disability and health benefits are processed by plan fiduciaries on a yearly basis, the Sixth Circuit's decision will necessarily have widespread impact on the conduct of plan fiduciaries across the country.

Initially, changing the law to permit awards of extra-contractual damages is likely to affect plan fiduciaries in the exercise of their fiduciary duties, all to the detriment of the integrity of the plan and the plan assets. Congress has dictated that plan fiduciaries perform their functions in a reasoned and considered fashion and in conformity with the fiduciary duties specified under ERISA. *See*

ERISA §404, 29 U.S.C. §1104. The threat of extra-contractual damage awards may compel fiduciaries to process unjustified claims or to settle suits for benefits which they would ordinarily resist, all in an effort to avoid exposure for extra-contractual damages. In the context of delays in processing claims, fiduciaries may feel compelled to speed up the process (at the expense of care and their fiduciary duties) in order to avoid the risk of exposure to an extra-contractual damage award due to the special circumstances of the participant; the particular needs of the participant; or the specific (but unknown) use the participant intends to make of the benefits once distributed. In order to avoid extra-contractual damage awards generally, and particularly in the context of delays in processing claims or in distributing benefits, fiduciaries may pay improper claims or distribute benefits to which the participant is either not entitled or in amounts greater than the participant is entitled to.

Rather than deterring fiduciaries from violating their ERISA responsibilities, opening the door to awards of extra-contractual damages may force fiduciaries to violate the principles of prudence and reasonableness imposed by ERISA, all to the financial detriment of plans as a whole—the focus of ERISA's civil enforcement remedies. *See Russell*, 473 U.S. at 142-143; *Sokol*, 803 F.2d at 535-537 (ERISA "focuses not on the direct protection of a beneficiary's interest, but on the protection of *the integrity of the plan* in which the beneficiary is enrolled.") (emphasis added).

In addition, the possibility of unpredictable and unanticipated personal liability will deter many qualified individuals and entities from serving as fiduciaries to employee benefit plans, particularly since the cost of fiduciary insurance may be prohibitive given the large potential exposure and the relatively minimal fees received by plan fiduciaries. One commentator has highlighted the crisis with respect to fiduciary liability insurance as follows:

> The effect of these new laws and regulations is to open the gates to more and more litigation by participants .... As a result, there is a compelling need for plans and trustees to purchase fiduciary liability insurance ... to cover defense and settlement costs. Unfortunately, insurers have been running scared as a result of the onslaught of laws and regulations, and, in particular, their inability to assess the risks .... Their knee-jerk reaction has been to raise premiums and impose cancellations or limitations in coverage.

Mamorsky, *Fiduciary Liability Insurance: The Time of Crisis Has Come*, J. Comp. & Benefits, Jan.-Feb. 1990, at 197. The question of whether extra-contractual damage awards can be adequately and efficiently insured is thus in doubt. As a result, qualified individuals and entities may be unwilling to place themselves in this impossible position.

Not only will the willingness of individuals and entities to serve as fiduciaries be diminished, but the availability of extra-contractual damages will cause a substantial proliferation of litigation. This Court, courts of appeals and most district courts have established a line of precedent denying the right to recover extra-contractual compensatory damages under ERISA. The Sixth Circuit's turnabout represents a major shift in the law which will necessarily result in increased litigation. Dissatisfied participants and beneficiaries will be encouraged to litigate even the most frivolous of claims due to the prospect of obtaining extra-contractual damages or, at a minimum, securing a favorable settlement from fiduciaries faced with significant and unknown liability exposure. The burden and expense of defending this flood of unnecessary litigation not only will fall on fiduciaries, but on the plans themselves and, ultimately, their participants and beneficiaries. Such a result would be directly contrary to Congress' goal of protecting the fiscal integrity of employee benefits plans.

See ERISA §2(a), 29 U.S.C. §1001(a). To the extent that the Sixth Circuit's decision authorizes the recovery of only certain types of extra-contractual damages, those determinations will necessarily be fact intensive and plan fiduciaries will be faced with even greater unpredictability with respect to performing their fiduciary duties.

Moreover, the flood of new litigation unleashed by the Sixth Circuit's decision will necessarily flow directly to the federal courts. All ERISA actions, other than actions to recover benefits under §502(a)(1)(B), are committed by §502(e)(1) to the *exclusive* jurisdiction of the federal courts. 29 U.S.C. §1132(e)(1). The Sixth Circuit has now held that extra-contractual compensatory damages can be awarded as "other appropriate equitable relief" under ERISA §502(a)(3) and, thus, the torrent of litigation that will follow will necessarily be litigated in the federal courts. In addition, actions that might already be litigated in the federal courts will necessarily include the more complicated and confusing issues relating to extra-contractual damages, all of which will place a substantial and additional burden on the federal judiciary. This will further burden already limited federal judicial resources and contribute to the existing crisis in the federal courts. Chief Justice Rehnquist has stated that:

> There is virtually no unused capacity in the system as it presently exists, and the difficulties of creating substantial additional capacity counsel caution, to say the least, in attempting it. We are in a position where we must think not about creating new federal causes of action, but of remitting to state courts some of the business now handled by the federal courts.

Address by Chief Justice William H. Rehnquist, Eleventh Seminar on the Administration of Justice (April 7, 1989), *reprinted in* 21 St. Mary's L.J. 5, 5-6 (1989).

In light of the foregoing, the advisability of permitting extra-contractual damage awards under ERISA is highly suspect. Certainly ERISA and its legislative history demonstrate that Congress did not intend for participants and beneficiaries to obtain awards of damages beyond the vested benefits to which they are entitled under employee benefit plans. The myriad of interpretations and definitions that have or could be given to extra-contractual damages, as demonstrated by prior precedent, also suggests that the standards for extra-contractual damage awards will be both ill-defined and unevenly applied. Quite simply, the benefits of imposing this risk on fiduciaries, whose administration of employee benefit plans is already subjected to a comprehensive scheme of statutory and regulatory provisions, including criminal penalties and liberal provisions for awards of attorney's fees, are far outweighed by the deleterious impact the Sixth Circuit's ruling will have on the orderly and efficient administration of employee benefit plans.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

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November 30, 1990

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided June 22, 1990)

No. 89-3331

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT WARREN, *et al.*,
Plaintiffs-Appellants,

v.

SOCIETY NATIONAL BANK, *et al.*,
Defendants-Appellees.

[905 F.2d 975 (6th Cir. 1990)]

Participant in retirement plan covered by ERISA sued plan trustee, seeking monetary damages. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., dismissed complaint, and participant appealed. The Court of Appeals, Lively, Senior Circuit Judge, held that participant stated cause of action for monetary damages, based on trustee's alleged failure to transfer assets from plan into fund within one year, causing participant to lose tax benefits.

Reversed.

DAVID A. NELSON, *Circuit Judge,* concurred and filed opinion.

WELLFORD, *Circuit Judge,* dissented and filed opinion.

WILLIAM D. BEYER (argued), GEORGE A. VINCE, JR., WULIGER, FADEL & BEYER, Cleveland, Ohio, *for plaintiffs-appellants.*

MICHAEL E. BRITTAIN (argued), JEFFREY L. NISCHWITZ, CALFEE, HALTER & GRISWOLD, Cleveland, Ohio, *for defendants-appellees.*

Before WELLFORD and NELSON, *Circuit Judges,* and LIVELY, *Senior Circuit Judge.*

LIVELY, *Senior Circuit Judge.*

This case arises under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. (1982). The issue relates to damages recoverable by a participant or beneficiary against an administrator or other fiduciary of a retirement plan. More specifically, the question is whether a plan participant may recover damages for a plan fiduciary's failure to follow the participant's instructions, under an option provided in the plan, for handling the participant's share of plan assets.

The district court held that such damages are not recoverable under section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3). We disagree.

I.

Because the district court dismissed this action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim, we treat the factual allegations of the amended complaint as true.

Robert Warren, a physician, was employed by Westgate Medical Anesthesia Group and participated in two of the group's retirement plans—a pension plan and a profit sharing plan and trust. The Society National

Bank (SNB) was trustee of both plans. Both plans provided several options under which a participant could withdraw his or her share of plan assets, including "Option 4: A single lump-sum payment."

Dr. Warren was advised that it would be advantageous for him to "roll over" his interests in the two retirement plans into a self-directed individual retirement account (IRA). Documents from the plans specifically allowed such a rollover as a means for continued deferral of income taxes on plan assets. In order to carry out the advice to cause a rollover from the retirement plans to the IRA, SNB was directed to transfer all of the assets in Dr. Warren's retirement plan accounts to the investment banking firm of Prescott, Ball and Turben, Inc. (PBT). As of September 30, 1984, Dr. Warren's balance in the two plan accounts totalled $556,242. SNB transferred approximately $388,148 in two distributions to PBT on December 5 and 11, 1984. The balance of $168,094 was transferred on January 9 and May 23, 1985.

Dr. Warren filed suit in district court. His amended complaint charged that SNB's failure to transfer all of the assets in his retirement plan accounts to the IRA in calendar year 1984 constituted a breach of the trustee's fiduciary duty. The amended complaint alleged that, either through negligence or in order to earn additional fees as trustee, SNB failed to distribute all of Dr. Warren's plan assets during a single calendar year. Under the Internal Revenue Code, the complaint alleged, the transfer to an IRA would have been a tax-free rollover if accomplished within a single calendar year. Because SNB failed to transfer all of the funds in 1984, that portion transferred in 1985 was subject to income

taxes. Dr. and Mrs. Warren paid $74,476 to the Internal Revenue Service and $12,729 to the State of Ohio, all out of funds received from the retirement plans.

In addition, according to the amended complaint, the funds that SNB transferred in 1985 lost their eligibility for rollover treatment and could no longer be retained in the IRA. Thus, future income earned on these funds has lost the benefit of "the compounding effect of tax deferment" and will be taxed as received rather than at the time of ultimate distribution from the IRA. The amended complaint alleged that the loss of rollover treatment damaged Dr. Warren in the total amount of $375,430.

As a beneficiary of the plans and a joint filer, Mrs. Warren joined Dr. Warren as a plaintiff. They sued SNB and an employee of the bank responsible for management of the plans. For convenience we will refer to the plaintiffs collectively as Dr. Warren or the plaintiff, and the defendants as SNB or the bank.

II.

A.

In support of its motion to dismiss the amended complaint for failure to state a claim the bank filed a brief in which it argued that the plaintiff was seeking to recover "extra-contractual" damages, a type it claimed was not recoverable under any section of ERISA. The bank relied on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), and a line of court of appeals decisions applying *Russell*. The bank argued that it had distributed all of Dr. Warren's assets and that his complaint sought no benefits due under the retirement plans. ERISA provides

only for recovery from a fiduciary of "contractual" damages, i.e., damages for failure to pay to a participant or a beneficiary funds or other benefits to which the participant is entitled under the terms of the plans.

Dr. Warren responded that his action for compensatory damages states a claim upon which relief can be granted because the damages it seeks are in fact "contractual." He equated contractual damages with "general" damages, and extracontractual damages with "special" damages, and asserted that the damages he sought were "general." Dr. Warren also attempted to distinguish *Russell* insofar as that case involved a delay in processing the plaintiff's claim for disability benefits in a situation where the plaintiff's entitlement to such benefits was disputed. The plaintiff in *Russell* sought punitive damages and compensatory damages for emotional distress and the cashing-out of the retirement savings of plaintiff's husband. Unlike *Russell*, in the present case Dr. Warren was fully vested in the retirement plan assets held by the bank, and he sought compensatory damages that flowed directly and proximately from the bank's failure to provide a contractual benefit, i.e., a single lump-sum distribution.

Dr. Warren filed copies of a "Summary Plan Description" for each plan. In addition to describing the plan and available optional settlements, each summary plan description contained the following statement:

> (6) TREATMENT OF DISTRIBUTIONS
>
> Whenever you receive a distribution from the Plan, it will normally be subject to income taxes. However, you may reduce, or defer entirely, the tax due on your distribution through use of one of the following methods:

(a) The rollover of all or a portion of the distribution to an IRA or another qualified employer plan. This will result in no tax being due until you begin withdrawing funds from the IRA or other qualified employer plan. BUT, the rollover of the distribution MUST be made within strict time frames (normally, within 60 days after you receive your distribution). Further, under certain circumstances all or a portion of a distribution may not qualify for this rollover treatment.

(b) Subjecting the distribution to favorable income tax treatment under the "10 year forward averaging" or "capital gains" method of taxation.

WHENEVER YOU RECEIVE A DISTRIBUTION, THE PLAN ADMINISTRATOR WILL DELIVER TO YOU A MORE DETAILED EXPLANATION OF THESE OPTIONS. HOWEVER, YOU SHOULD CONSULT QUALIFIED TAX COUNSEL BEFORE MAKING A CHOICE.

B.

The district court granted the bank's motion to dismiss on two grounds. First, the court held that the amended complaint did not allege sufficient facts to state a claim. The court stated that Dr. Warren did not allege that the terms of the summary plan descriptions explicitly imposed a duty on the bank to act within the calendar year. Further, the complaint did not allege that Dr. Warren advised the bank of the necessity of transferring all the funds during 1984, and "it is clear that the participant has the burden to instruct SNB concerning the particulars of his distribution before any duty could possibly arise on the part of the trustee to act accordingly." The court found nothing in the papers submitted by the plaintiff to suggest that it would be proper to infer a duty on the part of the bank to distribute Dr. Warren's retirement funds within one calendar year.

After granting the bank's motion on the basis of its finding that the amended complaint was defective, the district court proceeded to consider whether the damages claimed by Dr. Warren are recoverable under section 502(a)(3) of ERISA. The court discussed *Russell* and noted that it does not define "extracontractual" damages. Then, after noting that several courts have held that *Russell* precludes the recovery of extracontractual damages in actions brought pursuant to section 502(a)(3), the district court stated that it agreed with those decisions.

The district court then determined that the damages sought by Dr. Warren for "tax and tax interest liability and loss of investment earnings" are extracontracual in nature. It reached this determination by relying principally upon the statement in *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988), that damages sought by a plan participant in that case were extracontractual "in that the relief is not within the terms of [the] ERISA-governed benefit plan." The district court also concurred in the *Drinkwater* court's conclusion that "other appropriate equitable relief," as used in §502(a)(3) is limited to injunctive or declaratory relief. The court found that its conclusions are fully supported by the common law of trusts.

III.

A.

In *Russell*, a beneficiary sought compensatory and punitive damages for the improper or untimely processing of her claim for employee disability benefits. 473 U.S. at 136, 138, 105 S.Ct. at 3087, 3088. The action

was brought under section 502(a)(2)[1] of ERISA, 29 U.S.C. §1132(a)(2), claiming a cause of action under section 409(a)[2], 29 U.S.C. §1109(a). *Id.* at 138, 105 S.Ct. at 3088. The beneficiary sought compensatory damages for emotional distress and for the economic loss that resulted when the interruption of benefit payments allegedly forced the beneficiary's husband to cash out his retirement savings. *Id.* at 137, 105 S.Ct. at 3087; 722 F.2d 482 at 486-87 (9th Cir. 1983). Also, the beneficiary sought punitive damages. 473 U.S. at 138, 105 S.Ct. at 3088.

The issue in *Russell*, as defined by the majority opinion, was whether, under ERISA, "a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims." *Id.* at 136, 105 S.Ct. at 3087. The Court noted that "[b]ecause respondent relied entirely on §409(a), and expressly disclaims reliance on §502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." *Id.* at 139 n. 5, 105 S.Ct. at 3088 n. 5.

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[1] Section 502(a)(2) as codified in 29 U.S.C. §1132(a)(2), provides: (a) Persons empowered to bring a civil action. A civil action may be brought-*** (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title. . . .

[2] Section 409(a) as codified in 29 U.S.C. §1109(a), provides: (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

As the Court pointed out, the beneficiary had received all of the payments of disability benefits to which she was contractually entitled. Thus, the compensatory and punitive damages sought by the beneficiary were extracontractual. *Id.* at 138, 105 S.Ct. at 3088.

The Supreme Court found that section 409(a) did not provide express authority for an award of extracontractual damages to a beneficiary. *Id.* at 144, 105 S.Ct. at 3091. This conclusion was reached after examining the language of sections 409(a) and 502(a)(2), which indicate that Congress intended actions brought pursuant to these sections to be on behalf of the plan as a whole rather than an individual beneficiary. *Id.* at 142 n. 9, 105 S.Ct. at 3090 n. 9.

In addition, the Court concluded that the beneficiary had no implied cause of action under the principles of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). 473 U.S. at 145-48, 105 S.Ct. at 3091-93. "[I]n §409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims." *Id.* at 148, 105 S.Ct. at 3093. The Court reached this conclusion after examining the "six carefully integrated civil enforcement provisions found in §502(a)," which "provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146, 105 S.Ct. at 3092 (italics in original). Congress intended section 502(a) to provide the exclusive "panoply of remedial devices" for actions against a plan fiduciary by a participant or beneficiary to recover damages or other personal relief. *Id.*

Justice Brennan concurred with a separate opinion and was joined by Justices White, Marshall and Blackmun. According to Justice Brennan, *Russell* presented "a single, narrow question: whether the §409 'appropriate equitable relief' referred to in §502(a)(2) includes individual recovery by a participant or beneficiary of extracontractual damages for breach of fiduciary duty." *Id.* at 149, 105 S.Ct. at 3094. Although the majority opinion did not resolve whether and to what extent extracontractual damages are available under section 502(a)(3), Justice Brennan outlined the proper approach for courts to take in construing ERISA's provisions, including sections 404(a) and 502(a)(3). *Id.* at 150-51, 105 S.Ct. at 3094-95.

Justice Brennan stated that section 502(a)(3) provides for an award of "appropriate equitable relief" for acts or practices that violate any provision of ERISA or the terms of a retirement plan. *Id.* at 153, 105 S.Ct. at 3096. Therefore, a beneficiary may obtain "appropriate equitable relief" whenever an administrator breaches the fiduciary duties set forth in section 404(a). *Id.* at 154, 105 S.Ct. at 3096. Finding that "Congress intended by §404(a) to incorporate the fiduciary standards of trust law into ERISA," he would apply in ERISA cases "black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." *Id.* at 152-53, 105 S.Ct. at 3095-96 (footnote omitted). Under the law of trusts, "a beneficiary [is] entitled to a remedy 'which will put him in the position in which he would have been if the trustee had not committed the breach of trust.' " *Id.* at 157 n. 16, 105 S.Ct. at 3098 n. 16 (quoting Restatement (Second) of Trusts §205, and Comment *a* (1959)). Therefore, construing sections 404(a) and

502(a)(3) together, a beneficiary may obtain "appropriate equitable relief" for breach of fiduciary duties, and such equitable remedies "include provision of monetary damages." *Id.* at 154 n. 10, 105 S.Ct. at 3096 n. 10.

B.

Although the claim in *Russell* was brought pursuant to section 502(a)(2), courts of appeal that have considered the question have applied *Russell* in cases involving claims brought pursuant to section 502(a)(3). This court and other courts of appeal have held that punitive damages are not permitted under claims brought pursuant to section 502(a)(3). See, e.g., *Drinkwater,* supra; *Varhola v. Doe,* 820 F.2d 809 (6th Cir. 1987); *Powell v. Chesapeake & Potomac Tele. Co.,* 780 F.2d 419 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986); *Sommers Drug Stores v. Corrigan Enterprises,* 793 F.2d 1456 (5th Cir. 1986), *cert. denied,* 479 U.S. 1089, 107 S.Ct. 1298, 94 L.Ed.2d 154 (1987).

Also, several courts of appeal have held that "extracontractual" compensatory damages are not recoverable under section 502(a)(3). See *Drinkwater,* supra; *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302 (9th Cir. 1986); *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir. 1986); *United Steelworkers of America v. Connors Steel Co.,* 855 F.2d 1499 (11th Cir. 1988), *cert. denied sub nom. H.K. Porter Co. v. United Steelworkers of America,* _____ U.S. _____, 109 S.Ct. 1568, 103 L.Ed.2d 935 (1989), Without identifying any particular section of ERISA, this court stated in dicta that "[t]here can be no extracontractual recovery in the context of an ERISA plan." *Davis v.*

Kentucky Finance Cos. Retirement Plan, 887 F.2d 689 (6th Cir. 1989), *cert. denied*, _____ U.S. _____, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990).

In many cases in which the recovery of "extracontractual" compensatory damages under section 502(a)(3) has been denied, the plaintiffs sought compensatory damages for emotional distress. See *Powell*, supra; *Sokol*, supra; *United Steelworkers of America*, supra. Also, the recovery of "extracontractual" compensatory damages has been denied based on the belief that "other appropriate equitable relief" under §502(a)(3) means only declaratory or injunctive relief and does not include damages. *Drinkwater*, 846 F.2d at 824; *Sokol*, 803 F.2d at 538.

C.

In the present case, the district court concluded that the damages sought by Dr. Warren are not recoverable under section 502(a)(3), apparently on the basis that *Russell* precludes such damages. To the contrary, we find that the damages sought by Dr. Warren are recoverable.

Dr. Warren's claim differs from that of the plaintiff in *Russell* in two respects: (1) the nature of the alleged injuries and the relief sought, and (2) the statutory bases for the claim.

With regard to the nature of the claims, Dr. Warren claimed that the bank violated a contractual duty under the retirement plans to distribute his plan assets in accordance with his instructions. To support this claim, he filed a copy of a summary plan description for each plan. The summary plan descriptions provide specifically in Option 4 that a participant can elect to receive his or her retirement benefits in "[a] single lump-sum payment."

When a participant elects this option, the plan imposes a contractual duty on the fiduciary to honor it. A single lump-sum payment necessarily occurs during a single calendar year, and if paid to a qualified IRA, constitutes a rollover entitled to deferment for income tax purposes. The fiduciary has a contractual duty to abide by the participant's election of the type of distribution he desires.

Dr. Warren asserts that the bank violated its contractual duty by failing to carry out his instructions to distribute the assets of the plans. Moreover, by acting negligently or in its own interest, the bank violated the prudent man standard of care under section 404(a).[3]

Also, the injuries alleged by Dr. Warren—tax and tax interest liability and loss of investment earnings—are direct injuries resulting from the bank's failure to follow his instructions.

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[3] Section 404(a)(1) as codified in 29 U.S.C. §1104(a)(1) provides:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

In contrast, the plaintiff in *Russell* made no claim that the fiduciary of her disability plan violated a contractual duty. In fact, the plaintiff had received all the benefits to which she was contractually entitled. Also, rather than seeking damages for direct injuries, the plaintiff sought punitive damages and damages for the consequential injuries of emotional distress and the necessity of cashing out her husband's retirement savings.

With respect to the statutory bases for the claims, Dr. Warren brought his action pursuant to section 502(a)(3) claiming a cause of action under section 404(a)(1). In *Russell*, the action was brought pursuant to section 502(a)(2) claiming a cause of action under section 409(a).

While *Russell* is not dispositive, we are bound by the Supreme Court's statement that "[t]he six carefully integrated civil enforcement provisions found in §502(a) . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146, 105 S.Ct. at 3092 (italics in original). ERISA's civil enforcement remedies were intended to be exclusive. *Id.; Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987). However, since the majority opinion in *Russell* did not deal with section 502(a)(3), questions arising under that section remain open. 473 U.S. at 139 n. 5, 105 S.Ct. at 3088 n. 5.

IV.

A.

The question before this court is whether section 502(a)(3)—part of a "carefully integrated" enforcement scheme—permits the recovery of compensatory damages

to redress a direct injury to a participant by a fiduciary that allegedly violated its contractual duty under the terms of the retirement plans and under the provisions of ERISA. In deciding this question, we look again at the language of section 502(a)(3). Section 502(a)(3) provides in pertinent part:

> A civil action may be brought—
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations.

Pursuant to section 502(a)(3)(A), a participant may bring an action to enjoin any act that violates ERISA or the terms of a retirement plan. Thus, Congress expressly provided injunctive relief in (A). In addition, a participant may bring an action under section 502(a)(3)(B)(i) to obtain "other appropriate equitable relief" to redress violations of ERISA or the terms of a retirement plan. Under (B)(i), Congress appears to have expressly provided for equitable remedies other than injunctive relief.

In determining whether the damages sought by Dr. Warren constitute "other appropriate equitable relief," we find Justice Brennan's concurrence in *Russell*, discussed earlier in this opinion, to be instructive.

Justice Brennan stated that a beneficiary may seek "other appropriate equitable relief" when an administrator breaches the fiduciary duties set forth in section 404(a). See *Russell*, 473 U.S. at 154, 105 S.Ct. at 3096. Given that congress intended to incorporate the fiduciary standards of trust law into ERISA, it is proper

to apply "black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." *Id.* at 152-53, 105 S.Ct. at 3095-96 (footnote omitted). Under the law of trusts, "a beneficiary is entitled to a remedy 'which will put him in the position in which he would have been if the trustee had not committed the breach of trust.' " See *Id.* at 157 n. 16, 105 S.Ct. at 3098 n. 16 (quoting Restatement (Second) of Trusts §205, and Comment *a* (1959)). And, "other appropriate equitable relief" under section 502(a)(3), for breach of fiduciary duties set forth in section 404(a), includes the provision of monetary damages. *Id.* at 154 n. 10, 105 S.Ct. at 3096 n. 10.

Interestingly, the district court relied upon some of the same authorities as Justice Brennan to reach the opposite conclusion. For example, the district court relied upon the Restatement (Second) of Trusts §207 and another treatise in finding that a trustee's liability for breach of trust is limited to lost interest. In addition, the court referred to the description of two cases in A. Scott & W. Fratcher, *The Law of Trusts* §205 n. 2 (4th ed. 1988). In those cases the trustees caused a "bunching" of several years' income in a single year, resulting in an increase in the beneficiaries' income tax. Minnesota and Pennsylvania courts held in both instances that the trustees were not liable for such consequential damages.

We believe Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages. See *Russell*, 473 U.S. at 154 n. 10, 157 n. 16, 105 S.Ct. at 3096 n. 10, 3098 n. 16. Our position is

supported by decisions of other courts of appeals finding that equitable relief includes monetary damages where required to afford complete relief. It is the historic purpose of equity to secure complete justice, and courts may adjust their remedies so as to grant the necessary relief. *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1100 (7th Cir. 1981); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987). Equitable relief may include monetary damages if necessary to do complete justice. *Walters*, 642 F.2d at 1100; *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219, 1229 (7th Cir. 1982).

The term "other appropriate equitable relief" implies a broad range of remedies. We adhere to the principle "endorsed repeatedly . . . by the federal judiciary," that "when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985) (footnote omitted). One of the important goals of ERISA is to make certain that participants and beneficiaries not be deprived of the full value of their plan benefits by a fiduciary's breach of a contractual duty.

B.

Dr. Warren alleged that SNB breached a duty imposed upon it by the plans, and that ERISA provides for a complete remedy by stating that "[a] civil action may be brought . . . (3) by a participant . . . (B) to obtain other appropriate equitable relief (i) to redress such violations." He claimed that the bank's failure to make a single lump-sum distribution greatly diminished the

value of the funds distributed by making them subject to immediate income taxes that would not have been due if the bank had distributed them in such a way as to effect a rollover.

Dr. Warren brought this action to redress a violation of the terms of the plans—the alleged failure of the bank to perform a contractual duty. The act was completed. The bank allegedly had distributed Dr. Warren's plan assets contrary to his instructions, directly resulting in the loss of one of the most significant benefits available under ERISA. An injunction or declaration of rights would have provided no redress. The only redress available was damages to compensate him for the injury caused by the bank's breach of duty.

In light of the plain language of the statute, the common law of trusts, and the role of courts in equity, we find that the damages sought by Dr. Warren are recoverable as "other appropriate equitable relief" under section 502(a)(3)(B)(i).

This decision does not necessarily put us in conflict with the holdings of other courts of appeal that have disallowed extracontractual damages under section 502(a)(3). In some of the cases we have examined the plaintiffs sought punitive damages, which Dr. Warren is not claiming. In some instances the plaintiffs sought compensatory damages for such clearly consequential injuries as emotional distress. This case is different. Dr. Warren claims that, although the bank distributed all the plan assets to which he was entitled, the bank distributed them contrary to his instructions, directly causing a severe diminution in their value. Thus, he charges that by its negligence or for an impermissible purpose, it acted in such a way as to deprive him of a benefit to which he was entitled under the plans, thereby

violating provisions of the plans and of ERISA. The "carefully integrated civil enforcement provisions" of section 502(a)(3) should be held to provide an avenue of redress. Nothing in *Russell* holds to the contrary.

V.

We also conclude that the district court erred in holding that the amended complaint failed to state sufficient facts to withstand a motion to dismiss. A district court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) (footnote omitted). Considering the allegations of the amended complaint as true and viewing them in a light most favorable to the plaintiff, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245, 106 S.Ct. 2505, 2508, 91 L.Ed.2d 202 (1986), we cannot say that it appears beyond doubt that Dr. Warren can prove no set of facts that would entitle him to recover. The amended complaint gives clear notice of the nature of Dr. Warren's claim and its basis, and it contains factual allegations that are sufficient to withstand a Rule 12(b)(6) motion.

CONCLUSION

The district court erred in dismissing the case. Accordingly, the judgment is reversed and the case is remanded for further proceedings. We make no ruling and express no opinion on the merits of Dr. Warren's claim. The district court will reach the merits in due course after the pleadings and discovery are complete.

DAVID A. NELSON, *Circuit Judge*, concurring.

In its brief on appeal, the defendant bank says that it "disputes Plaintiffs' contention that the transfer of the assets in two different calendar years resulted in . . . the loss of any income tax deferral status." This issue has not been briefed, and the rules on tax-free rollovers are complex enough to suggest that it would be unwise for us to try to make sense of them on our own. I assume that on remand the parties will have an opportunity to explain their respective positions on the actual tax consequences of any multi-year distributions that may have occurred. (Each of Dr. Warren's retirement plans stands alone, presumably, and one cannot be certain, from the amended complaint, that assets from any individual plan were transformed in more than one year.)

If the plaintiffs succeed in showing that tax-free rollovers can only be accomplished in a single calendar year, and if it turns out that multi-year transfers were made from individual plans, I take it that a number of essentially factual issues are likely to be presented. The plaintiffs allege, for example, that the bank had a fiduciary duty to administer the retirement plans "competently;" do reasonably careful trustees in fact make it their business to minimize the exposure of plan beneficiaries to taxation? When he decided to withdraw from the plans, did Dr. Warren in fact notify the bank of an election to take "a single lump-sum payment" from each plan? Did the instruments creating the trusts, or any other plan documents to which the bank was a party, specify that all income earned to the date of transfer would have to be paid simultaneously with the payment of principal? Did the bank really delay the transfer of portions of the trust assets in order, as the amended complaint alleges, "to continue generating fees for its management," or was there a more benign explanation? And if there was a breach of duty that

made it necessary for the Warrens to pay $87,205 in taxes sooner than they would have otherwise have had to, and if it did in fact cause an acceleration of the time when they would lose the benefit of a tax-deferred compounding of the income on $168,094, what was the present value of the advantages which they lost? Without knowing the answers to these and similar questions, we cannot say whether all or any part of the damages sought by Dr. Warren are recoverable.

I concur in the judgment that the bank failed to show that it was entitled to a dismissal of the case for failure of the amended complaint to state a claim upon which relief could be granted. I have written separately merely to suggest that the questions remaining to be decided may prove to have a much broader sweep than the narrow question that is before us now.

WELLFORD, *Circuit Judge,* dissenting.

The district court in this interesting case held for the defendant Bank, and, in any event, would limit damages to recovery of the amount due the Warrens under the plan plus interest.[1] The court found that the Warrens did "not allege that they instructed SNB to complete the transfer of the funds prior to December 31, 1984. Nor do they allege that SNB, by virtue of its 'familiar[ity] with such matters,' should have known to do so." The district court held that "extracontractual damages are not recoverable in actions, like the present one, brought pursuant to §1132(a)(3)." Quoting *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821, 824 (1st Cir.), *cert. denied,* 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988), the court concluded that "compensatory and

[1] The district court cites 3A A. Scott & W. Fratcher, *The Law of Trusts* §205 n. 2 (4th ed. 1988), for the latter proposition.

punitive damages ... are extracontractual," and that "other appropriate equitable relief," as used in §1132(a)(3)(B) of ERISA, "should be interpreted to mean what it says—declaratory or injunctive relief, not compensatory and punitive damages." *See also* Note, 71 Cornell L.Rev. 1014 (1986).

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n. 9, 105 S.Ct. 3085, 3090 n. 9, 87 L.Ed.2d 96 (1985), the Supreme Court referred to §502(a)(2) as "the enforcement provision for §409," that authorizes suits by four classes of persons including "beneficiaries" such as Dr. Warren. The Court emphasized that "the common interest shared by all four classes is the *financial integrity of the plan.*" *Id.* (emphasis added). The Court added that Congress intended the enforcement or remedies part of ERISA (§502) to "protect the *entire plan*, rather than ... the rights of an individual beneficiary." *Id.* at 142, 105 S.Ct. at 3090 (emphasis added). Discussing the plan administrators' delay in processing Russell's disputed claim, the Court found that, "[T]here really is nothing at all in the statutory text to support the conclusion that such a delay [by the plan administrators] gives rise to a private right of action for compensatory or punitive relief." *Id.* at 144, 105 S.Ct. at 3091.[2] The court concluded:

> Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in §409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or *untimely processing* of benefit claims.

473 U.S. at 148, 105 S.Ct. at 3093 (emphasis added).

[2] Justice Stevens reiterated that, "the six carefully integrated civil enforcement provisions found in §502(a) of the statute ... provide strong evidence that Congress did *not* intend to authorize other remedies." 473 U.S. at 146, 105 S.Ct. at 3092 (emphasis in original).

The majority seizes on language in Justice Brennan's concurrence that characterizes some of the language cited above as "dicta . . . sweeping more broadly than the narrow ground of resolution." *Id.* at 150, 105 S.Ct. at 3094. I would take the opinion of the majority in *Russell*, even if dicta, as setting a proper guide to follow rather than Justice Brennan's separate opinion which speaks for a minority of the Court.

We have followed the language of the majority in *Russell* in holding that §502(a)(3) of ERISA does not authorize "extracontractual" damages in the form of punitive awards. *See Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987). Four courts of appeals and several district courts have read the majority opinion in *Russell* to prohibit the recovery of "extracontractual" compensatory damages under §502(a)(3). *See, e.g., Amos v. Blue Cross-Blue Shield*, 868 F.2d 430, 431 (11th Cir.), *cert. denied*, _____ U.S. _____, 110 S.Ct. 158, 107 L.Ed.2d 116 (1989); *Drinkwater*, 846 F.2d at 825; *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986) ("[D]amages for emotional distress are unavailable under §502(a)(3) as well as under §409."); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1307 (9th Cir. 1986) ("[L]anguage of section 1132(a)(3) providing for 'equitable relief' . . . supports this view in that extracontractual damages against a fiduciary are not an available form of 'equitable relief.' "); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986) ("[T]he provision for 'other appropriate equitable relief,' whatever it embraces, cannot be held to authorize extracontractual or punitive damages for the breach of a plan administrator's fiduciary duties under ERISA.").

Recently, we stated, in agreement with these other circuit courts, that "[t]here can be no extracontractual recovery in the context of an ERISA plan." *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 696 (6th Cir. 1989), *cert. denied*, _____ U.S. _____, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990). The majority seeks to characterize this as dicta, but plaintiff in *Davis* asserted reversible error in the district court's refusal to allow her "to litigate her claims for extracontractual compensatory and punitive damages." *Id.* at 695. The majority's expression that the contrary holding in *Davis* constitutes dicta is simply mistaken.

Contrary to the majority's holding in this case, the panel in *International Union UAW Local 91 v. Park-Ohio Indus.*, 876 F.2d 894 (6th Cir. 1989) (unpublished opinion), applied the same rationale adopted in *Davis* in holding that extracontractual damages are not recoverable under §502(a)(3). The panel stated:

> Relying upon the Ninth Circuit's opinion in *Sokol*, the district court found *Russell's* rationale equally applicable in the present case, and went on to reason that the legislative history of ERISA would compel a finding that extracontractual damages are unavailable, as well. The union contends, however, that this is an issue that *Russell* expressly left open, and that the legislative history of ERISA demonstrates that the principles of the law of trust [sic] should be incorporated, including alternative remedies for a breach of trust that would meet the objective of "making a beneficiary whole."
>
> We are unpersuaded by the union's vague reference to trust law principles. Indeed, ERISA's incorporation of the law of trusts argues against allowing extracontractual compensatory damages in actions for b each of fiduciary duties under §§1132(a)(1)(B) or 1132(a)(3) of ERISA. As *Varhola*

> indicates, extracontractual damages are not ordinarily available in breach of trust cases, whether or not in some attenuated sense such damages might "make the plaintiff whole." Further, we find *Russell* controlling and join the other circuits which have held that the language and structure, as well as the legislative history of §1132 prohibit the allowance of such damages.
>
> Accordingly, we affirm the district court's holding that extracontractual compensatory damages are not available in actions under §§1132(a)(1)(B) or 1132(a)(3) of ERISA.

Id.

With all due respect, neither Judge Lively nor Judge Nelson have cited a single ERISA case holding that extracontractual compenstory damages are recoverable under §502(a)(3).[3] Moreover, I do not find Justice Brennan's separate opinion in *Russell* to be controlling or "instructive" on the issue before us. I agree with the conclusions of this court and each of the other circuits which have interpreted the pertinent ERISA language at issue in this case and emphasize that we are compelled to follow the prior precedent of this court.

The damages sought by the Warrens unfortunately, and I am not unsympathetic to their plight from a tax standpoint, are not recoverable as extracontractual

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[3] *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981), *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987), *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219 (7th Cir. 1982), and *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), do not pertain to statutory provisions similar to those at issue in this case. The First and Ninth Circuits, moreover, have specifically held in ERISA construction cases, contrary to earlier "equity" language of *Cia. Petrolera* and *Martinson*, that ERISA does *not* provide extracontractual consequential type damages. *See Drinkwater, supra*, and *Hancock, supra*.

claims or as "other appropriate equitable relief" under §502(a)(3)(B)(i) or any other section of ERISA. Our court has already said as much in *Davis* (and to the same effect in *Varhola*), and all other circuits which have considered this question have so interpreted ERISA. Because I find no allegation in the Warrens' amended complaint that SNB was under a specific duty or specific instruction to complete the transfer of the funds by December 31, 1984, I can see no basis for the extensive efforts of my brethren to create a cause of action for the Warrens on general equitable principles apart from the language of ERISA.

I would affirm the decision of the district court. I accordingly DISSENT.

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 14, 1989)

Civil Action Number C87-3451

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT COURT OF OHIO
EASTERN DIVISION

ROBERT WARREN, *et al.*,
Plaintiffs,

vs.

SOCIETY NATIONAL BANK, *et al.*,
Defendants.

The Court has filed its memorandum and order in this case. Therefore,

IT IS ORDERED that SNB's motion to dismiss Warrens' amended complaint is granted.

IT IS FURTHER ORDERED that Warrens' first amended complaint is dismissed, with prejudice in its entirety.

IT IS FURTHER ORDERED that this action is dismissed with prejudice, plaintiff to pay costs.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 14, 1989)

Civil Action No. C87-3451

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
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ROBERT WARREN, *et al.*,
Plaintiffs,

vs.

SOCIETY NATIONAL BANK, *et al.*,
Defendants.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Plaintiffs herein, Robert and Carole Warren, have sued the trustee of Robert Warren's two retirement plans, Society National Bank, a national banking association, and Joel A. Pandon, a Society National Bank employee responsible for managing the retirement funds (collectively "SNB"), for failing to transfer all of the funds in Robert Warren's retirement plans into his individual retirement account ("IRA") prior to December 31, 1984. In their first amended complaint, the Warrens assert a claim pursuant to §502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(3), and allege that SNB's failure to transfer all of the assets in the retirement plans to the

IRA within the 1984 calendar year constitutes a breach of the trustee's fiduciary duties, as imposed by 29 U.S.C. §1104(a)(1). The Warrens further allege that as a direct and proximate result of SNB's conduct, they have incurred tax and tax interest liability, and have lost investment earnings because the transferred funds became ineligible for tax-deferring "rollover" treatment under the Internal Revenue Code.

SNB now moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Warren's first amended complaint for failure to state a claim upon which relief can be granted. Specifically, SNB asserts that the Warren's claims should be dismissed because the damages alleged are extracontractual and, as such, are not recoverable under ERISA.

As set forth below, this Court finds that the Warrens have not alleged in their first amended complaint facts sufficient to support an inference by the Court that SNB was under a duty to act in a manner other than that which is complained of here. Moreover, the Court is not persuaded that the Warrens' alleged damages, tax and tax interest liability and loss of investment earnings, can be categorized as other than "extracontractual" damages. This Court accordingly grants defendants' motion to dismiss plaintiffs' amended complaint.

I.

Dr. Robert Warren was employed by Westgate Medical Anesthesia Group, Inc. ("Westgate"), and held an interest in the company's Pension Plan and Profit Sharing Plan and Trust ("retirement plans"). The Warrens contend that in 1984, while Dr. Warren was planning for his retirement, he was advised by his

financial planners that it would be advantageous to cause his interests in the retirement plans to be rolled over into a self-directed IRA.

The Warrens contend that, as of September 30, 1984, the assets in Dr. Warren's retirement plans totalled $556,242.34. Dr. Warren contends further that, pursuant to "Option 4" of the Summary Plan Descriptions ("SPDs") prepared and provided to him by Westgate, he directed SNB to transfer all of the assets in his retirement plans to Prescott, Ball and Turben, Inc. ("PBT"), an independent banking firm which managed Dr. Warren's IRA. SNB, however, caused only a portion of the assets to be transferred on December 5, 1984 and on December 11, 1984. Not until January 9, 1985 and May 23, 1985 were the remaining assets transferred to PBT.

As a result of what the Warrens consider a delayed transfer of funds, Dr. and Mrs. Warren incurred liability for additional tax and tax interest in 1985 to the Internal Revenue Service in the amount of $74,476.00, and to the state of Ohio in the amount of $12,729.00. Moreover, the Warrens claim, the funds which SNB failed to transfer until 1985 lost eligibility for rollover treatment and could no longer be retained in Dr. Warren's IRA. Had the funds remained eligible for rollover treatment, and thus been retained in the IRA, the interest income generated would have been compounded and accumulated tax free until ultimately disbursed. Because, once lost, the tax-free status cannot be regained, all interest income thereafter earned is subject to taxation as earned, and is not available for the compounding effects of tax deferment. Dr. Warren contends that the loss of income caused by the failed rollover amounts to $375,430.00.

The Warrens imply that because, pursuant to the provisions of the Internal Revenue Code ("IRC"), transfer of funds from a retirement plan to an IRA, when accomplished within the calendar year, secures tax-free rollover treatment, and because the Warrens' plans, by their terms, explicitly permit this type of rollover, SNB was under a fiduciary duty to effect a secure rollover upon request. In compensation for SNB's alleged breach of a fiduciary duty, the Warrens seek damages, pursuant to §502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3),[1] for their increased tax and tax interest liability, as well as for their loss of tax-free earnings.

SNB moves to dismiss the Warrens' complaint for failure to assert an injury compensable under ERISA. SNB asserts that the Warrens' alleged damages are extracontractual and that extracontractual damages are not available under ERISA. The Warrens respond that the damages they seek are contractual and, therefore, recoverable, likening their tax liability and loss of IRA earnings to interest, which has been found recoverable under ERISA.

The issues before this Court are whether a breach of duty occurred, and—if it did—to what extent the claimed damages are compensable.

II.

The allegations of the complaint must be taken as true and construed in a light most favorable to the plaintiffs. *Windsor v. The Tennessean*, 719 F.2d 155, 158

[1] SNB does not dispute that the retirement plans fall within the meaning of "employee benefit plans" as defined in ERISA, *see* 29 U.S.C. §1002(3), and that Robert and Carole Warren were a participant and a beneficiary, respectively, under the retirement plans. *See* 29 U.S.C. §1002(7)(8).

(6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiffs could prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the Court need not accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

III.

Participants and beneficiaries who bring actions under ERISA assert claims under one of the first three subsections of §1132(a) of ERISA:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin *any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plans. . . .*

29 U.S.C. §1132(a)(1)-(3) (1982) (emphasis added). Pursuant to this section, the Warrens seek damages to redress actions on the part of SNB which allegedly violated either the terms of the retirement plans, or the

duty of care imposed by ERISA on all trustees of retirement plans within the scope of the act. *See* 29 U.S.C. §1104(a)(1). SNB does not dispute that, as trustee, it had a fiduciary duty under the statute to administer the plans competently. *See* 29 U.S.C. §§1004(21)(A), 1104. The core of the Warrens' argument is that SNB's failure to heed their request to distribute retirement plan funds before the end of the calendar year does in fact constitute tortious incompetence for which SNB should be held liable.

The Court looks first to those pages of the SPDs submitted by the Warrens, which set forth options and suggestions for participants concerning distribution of their retirement plan funds. Receipt of a single lump sum payment, such as that requested by Dr. Warren, is provided for as "Option 4." Item (6) of Option 4 is of particular relevance to the matter at hand:

> (6) TREATMENT OF DISTRIBUTIONS
>
> Whenever you receive a distribution from the Plan, *it will normally be subject to income taxes.* However, you may reduce, or defer entirely, the tax due on your distribution through use of one of the following methods:
>
> (a) The rollover of all or a portion of the distribution to an IRA or another qualified employer plan. This will result in no tax being due until you begin withdrawing funds from the IRA or other qualified employer plan. BUT, *the rollover of the distribution MUST be made within strict time frames* (normally, within 60 days after you receive your distribution). Further, *under certain circumstances all or a portion of a distribution may not qualify for this rollover treatment.*

> WHENEVER YOU RECEIVE A DISTRIBUTION, THE PLAN ADMINISTRATOR WILL DELIVER TO YOU A MORE DETAILED EXPLANATION OF THESE OPTIONS. *HOWEVER, YOU SHOULD CONSULT QUALIFIED TAX COUNSEL BEFORE MAKING A CHOICE.*

SPD at p. 14 (emphasis added).

It is not disputed that the efficient rollover which Dr. Warren sought is *permitted* under the terms of SPDs, and that the SPDs acknowledge and even correctly advise participants that a strict time frame must be followed in order that funds qualify for tax free rollover treatment. However, the Warrens themselves do not allege that the terms of the SPDs *explicitly* impose a duty upon SNB to act within the calendar year. Moreover, when the acknowledgement is read in combination with the SPDs' admonition to participants to consult qualified tax counsel, it is clear that the participant has the burden to instruct SNB concerning the particulars of his distribution before any duty could possibly arise on the part of the trustee to act accordingly. The Warrens have made no allegation that they communicated to SNB the necessity of transfering the retirement funds to the IRA within the 1984 calendar year. Nor have they alleged that SNB knew or should have known that the distribution should have been so made. The Warrens allege only that "SNB was directed to transfer all of the assets in Dr. Warren's retirment plans to PBT." First amended complaint at 2. Absent a showing of such instructions or such knowledge on the part of SNB, the claimed duty most certainly cannot be inferred. In summary, the Court finds that nothing in the terms of the SPDs, or at least those portions submitted to the Court, suggests that it

would be proper for the Court to infer a duty on the part of SNB to distribute Dr. Warren's retirement funds within one calendar year.

Section 1104(a)(1) of ERISA imposes a fiduciary duty of care on trustees of benefit plans governed by the statute. In relevant part, §1104(a)(1) reads as follows:

> §1104. Fiduciary duties
>
> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) *for the exclusive purpose of:*
>
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

29 U.S.C. §1104(a)(1) (emphasis added).

Although the "exclusive purpose" language of §1104(a)(1) does not dispose of the issues before this Court, it does reinforce the proposition that the fiduciary duty is to be narrowly construed because "benefit" in the ERISA context is a term of art generally understood to mean those monies paid pursuant to the plans in question. *See* 29 U.S.C. §§186(c), 1002(1).

The Court therefore considers the force of the Warrens' allegation that SNB breached the fiduciary duty imposed by §1104(a)(1) in light of the explicitly

limited language of this section. The Warrens do not allege that they instructed SNB to complete the transfer of the funds prior to December 31, 1984. Nor do they allege that SNB, by virtue of its "familiar[ity] with such matters," should have known to do so. Given the apparent laxness of the Warrens' instructions the Court cannot conclude that "under the circumstances then prevailing", SNB was under a duty, pursuant to §1104(a)(1), to transfer all of the funds within the calendar year.

Absent a duty on the part of SNB to transfer all of the retirement funds within the calendar year, express or implied from either the terms of the Summary Plan Descriptions or under §1104(a)(1) of ERISA, SNB cannot be found liable to the Warrens for acting as it did. This Court accordingly grants defendants' motion to dismiss plaintiffs' amended complaint.

In addition to whether a relevant breach of duty can be implied, the Court also considers the parties' dispute regarding whether the alleged damages are recoverable under ERISA. The Warrens contend that, pursuant to §1132(a)(3), SNB is liable for the losses they incurred as a result of the alleged violations of §1104 of ERISA. Relying on *Massachusettts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985) ("*Russell*"), and its progeny, SNB asserts to the contrary that the damages sought by the Warrens are "extracontractual" and, as such, are not recoverable under §1132(a)(3) even if a breach of duty did occur.

In *Russell*, the Supreme Court held that Congress did not provide for payment of extracontractual damages to beneficiaries successfully prosecuting a §1109(1) claim for breach of fiduciary duty under ERISA. 473 U.S. at

148. Although the Court said that "[t]he six carefully-integrated civil enforcement provisions found in 29 U.S.C. §1132(a) of the statute as finally enacted ... provide strong evidence that Congress did *not* intend to authorize other remedies ...," *id.* at 146 (emphasis in original), the Court specifically noted that it was not deciding whether extracontractual damages are available under ERISA civil enforcement provisions other than §1132(a)(2). *Id.* at 139 n.5. However, several courts have since held that the *Russell* decision requires that extracontractual damages be precluded in actions brought pursuant to §1132(a)(3). *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), was among the earliest of these cases and, although the court recognized that *Russell* did not dispose of the issue, the *Sokol* court stated, "[A] textual exegesis of the *Russell* opinion, combined with careful examination of the statute's structure and legislative history, compels the conclusion that damages for emotional distress are unavailable under §1132(a)(3) as well as under §1109." *Id.* at 534. *See also Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (punitive damages not allowed); *United Auto Workers v. Park-Ohio Industries, Inc.*, 661 F. Supp. 1281 (N.D. Ohio 1987) (emotional and punitive damages not recoverable).

Since extracontractual damages are not recoverable in actions, like the present one, brought pursuant to §1132(a)(3), this Court must now determine whether the damages sought by the Warrens, tax and tax interest liability and loss of investment earnings, are damages properly categorized as contractual or extracontractual. Unfortunately, the distinction between "contractual" and "extracontractual" is not clear.[2] Although the Supreme

[2] *See* Note, *Participant and Beneficiary Remedies Under ERISA; Extracontractual and Punitive Damages After Massachusetts Mutual Life Insurance v. Russell*, 71 Cornell L.Rev. 1014 (1986).

Court used the term "extracontractual damages" in *Russell*, it did not provide a definition for the term. The Warrens rely on *Vogel v. Independence Savings Bank*, No. R-87-1207, slip op. (D.Md. Aug. 9, 1988), *inter alia*, to support their argument that extracontractual damages are analogous to special damages. "These damages in effect represent special damages and 'are the actual, but no [sic] the necessary, result of the injury complained of, and which in fact follows it as the natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions." *Id.* at 23 (quoting *Black's Law Dictionary* 354 (5th ed. 1979)). The Warrens argue that the tax and investment losses they incurred are not extracontractual because the losses were not dependent on any "special circumstances" on their part. Rather, the Warrens assert, "[a]ny plan participant requesting a rollover to an IRA would have suffered the same loss." Plaintiffs Brief in Opposition at 4.

Also interpreting the *Vogel* definition, SNB contends to the contrary that the damages alleged by the Warrens *are* extracontractual *because* of special circumstances:

> If Plaintiffs incurred any damages at all as a result of the delay, such damages resulted from the unique and special circumstances surrounding the transfer of assets, including Plaintiffs' own election to transfer assets to an IRA. . . .

Defendants' Motion to Dismiss at 15. Since both the Warrens' and SNB's analyses of the facts herein are reasonable in light of the *Vogel* definition of extracontractual damages, that definition is not dispositive of the issue. This Court must look elsewhere for a more precise meaning of the term.

In 1988, the First Circuit gave more specific meaning to "extracontractual damages" when it said, "[t]he compensatory and punitive damages sought by [the plan participant] are extracontractual in that the relief is not within the terms of [the] ERISA-governed benefit plan." *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir. 1988). As in the case at hand, the damages in *Drinkwater* were not expressly authorized by ERISA, but were alleged by plaintiffs to come within the statutory grant of "other appropriate equitable relief" under §1132(a)(3)(B). The First Circuit looked to the legislative history of ERISA and concluded that

> the comprehensive provisions of ERISA were intended by Congress to be the exclusive remedy for beneficiaries under ERISA-authorized plans. . . . 'Other appropriate equitable relief' should be interpreted to mean what is says—declaratory or injunctive relief, not compensatory and punitive damages.

Id. This Court finds the First Circuit's meaning of "extracontractual damages" and the rationale therefor persuasive. If relief sought is not expressly provided for within the terms of an ERISA-governed benefit plan, such relief is extracontractual and is not recoverable in claims under §1132(a)(3).

This position is fully supported, if not required, by the common law of trusts, to which Congress intended courts to look when resolving ERISA disputes.[3] "[T]he

[3] In hearings on the matter, Senator Williams stated that by requiring strict fiduciary standards, Congress intended to make the common law of trusts applicable to ERISA. 120 *Cong. Rec.* 29, 932 (1974). *See also* H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4639, 4649 ("The fiduciary responsibility section . . . [of ERISA] . . . codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts."). For a detailed discussion of the applicability of the law of trusts to ERISA claims, see Note, *supra* note 2, at 1127-30.

only measure of damages for failure to pay money is not the consequential damages resulting from the peculiar circumstances of the payee, but the lawful interest accrued on the amount due." 90 C.J.S. *Trusts* §338 (1955) (footnotes omitted). The Warrens seek to analogize their circumstances to several ERISA cases in which courts awarded interest damages to prevailing plaintiffs, having found that such damages, though not within the terms of the retirement plans, are nonetheless contractual and, therefore, recoverable. *See, e.g., Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Kaszuk v. Bakery and Confectionary Union and Indus. Int'l Pension Fund*, No. 83-C-1177, slip op. (N.D. Ill. July 15, 1985). These decisions do not conflict with the law of trusts, however, which has long afforded special treatment to claims of lost interest, and has permitted the award of damages therefor, despite the fact that interest may be distinct and separate from the terms of a trust agreement. The Restatement (Second) of Trusts, accordingly, dedicates an entire section to the subject of interest awards and states that trustee liability for extracontractual damages is imposed for interest lost when the trustee commits a breach of trust, but also specifically limits this exception to interest. *Restatement (Second) of Trusts* §207 (1959).

In his treatise on the law of trusts, Professor Scott describes two cases in which the facts are very similar to those herein and which support SNB's position that the Warrens' damages are not recoverable:

> In *In re Trust under Will of Comstock*, 219 Minn. 325, 17 N.W.2d 656 (1945), a trustee had been surcharged for the difference between income actually received and income at the ordinary trust rate that should have been received, and this was paid in a single year, with the result that the beneficiary was subject to a higher income tax than that to which he would have been subject if the

> income had been paid during the preceding years. It was held that the trustee was not subject to a liability to the beneficiary for the increased tax, since *one who fails to pay money when due is not liable for consequential damages.*
>
> A similar result was reached where the trustee in breach of trust delayed suing a third person for income due to the estate, with the result that the income for several years was paid in one year, thus increasing the income tax of the beneficiary. *Wanamaker's Trust Estate,* 340 Pa. 419, 17 A.2d 380 (1941), *aff'g* 38 D. & C. 347 (1940).

3A A. Scott & W. Fratcher, *The Law of Trusts,* §205, n.2 (4th ed. 1988) (emphasis added). The common law of trusts thus supports the definition of "extracontractual damages" that is persuasive to this Court, and which precludes the Warrens from recovering compensatory damages for tax and tax interest liability and lost earnings from investments in their §1132(a)(3) ERISA claim.

IV.

Because the Warrens have not alleged in their amended complaint facts sufficient to support an inference by the Court that SNB was under a duty to act in a manner other than that which is complained of, and because the "extracontractual" damages they seek would not be recoverable even upon a successful showing that SNB breached a fiduciary duty running to them as a plan participant and beneficiary, SNB's motion to dismiss the Warrens' amended complaint must be granted. The Warrens' first amended complaint is hereby dismissed, with prejudice, in its entirety.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

(Filed September 4, 1990)

No. 89-3331

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT WARREN; CAROLE Z. WARREN,
Plaintiffs-Appellants,

v.

SOCIETY NATIONAL BANK; JOEL A. PANDON,
Defendants-Appellees.

ORDER

BEFORE: WELLFORD and NELSON, *Circuit Judges*; and LIVELY, *Senior Circuit Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

STATUTES INVOLVED

29 U.S.C. Section 1104

FIDUCIARY DUTIES

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's, or beneficiary's exercise of control.

LIABILITY FOR BREACH OF FIDUCIARY DUTY

Sec. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. Section 1132

CIVIL ENFORCEMENT

Sec. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b)(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to

so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding) only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515.

(c)(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the courts' discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4). For purposes of this pragraph, an annual report that has been rejected under section 104(a)(4) for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) with respect to any participant or beneficiary may in the court's discretion be liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section

4975(f)(4) of the Internal Revenue Code of 1986) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secetary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l)(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiducairy or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secetary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.